Supreme Court, U.S.
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In the

# Supreme Court of the United States

ZUZANA J. DILLON, PERVIZ CHOKHANI, AND ELIN-KAI GOTTSCHALK,

*Petitioners,*

*versus*

COLIN POWELL, *et al.*,

and

CAROLEE BRADY HARTMAN, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## REPLY TO BRIEF IN OPPOSITION FILED BY CLASS COUNSEL

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I

Class counsel concede that *Pioneer Inv. Serv. Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993) ("*Pioneer*") and *Orthopedic Bone Screw Prod. Liab. Litig.*, 246 F.3d 315 (3d Cir. 2001) ("*Orthopedic Bone Screw Products*") provide the rule of law applicable to requests for relief from time deadlines established pursuant to Fed.R.Civ.P. 23. However, class counsel's argument that the U.S. Court of Appeals for the D.C. Circuit followed the same legal analysis required to determine "excusable neglect" as that of the Third Circuit "and applied *Pioneer* in much the same way," is incorrect for several reasons.[1] *See* Opposition of Class Counsel at 7.

First, the Third Circuit provided a detailed analysis of all ***four*** of the *Pioneer* factors in *Orthopedic Bone Screw Products*, 246 F.3d at 315. The Third Circuit followed the same analysis in its earlier cases. *In re Cendant Corp. Prides Litig.* 234 F.3d 166 (3rd Cir. 2000) ("*Cendant Prides II*") (vacating and remanding for failure to consider required factors); *In re Cendant Corp. Prides Litig.*, 235 F.3d 176 (3rd Cir. 2000) ("*Cendant Prides III*") (reversing denial of motion to participate in settlement). This approach is mandated by *Pioneer*, which requires consideration of all four factors prior to engaging in their equitable weighing of the four factors. 507 U.S. at 395.

The split of the circuits is evident from the face of the court of appeals decision below because the District of Columbia Circuit analyzed only two of the four *Pioneer* factors. The court of appeals never discussed the issue of whether petitioners' delay in seeking relief from the district court was beyond their "reasonable control." The D.C. Circuit never analyzed whether the class members acted in "good faith." In view of these omissions from the D.C. Circuit's analysis, it is reasonable to conclude that the court of appeals below did not consider itself required by *Pioneer*

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[1] The Court granted the Solicitor General an extension of time to November 14, 2001 for filing his response to the Petition.

to consider all four of the *Pioneer* factors and did not, in fact, consider all four *Pioneer* factors in rendering its decision. Instead of applying the teachings of this Court in assessing whether there is "excusable neglect," the court of appeals allowed the district court "discretion to decline to find neglect to be excusable and deny an extension request where, for example, there is evidence of prejudice to other parties or to the judicial administration of the case." *Hartman v. Powell*, 2001 WL 410461, *1 (D.C. Cir. 2001). The D.C. Circuit erred in ignoring the other two factors and its approach is in direct conflict with that taken by the Third Circuit.

## II.

Class counsel implicitly recognize the deficiencies in the court of appeals decision and seek to provide the analysis of the third and fourth *Pioneer* factors that was omitted by the decision below. Opposition at 12-14. The D.C. Circuit never addressed whether petitioners' delay in seeking relief from the district court was beyond their "reasonable control" and whether they acted in "good faith." This is certainly a very different legal issue from whether defendants violated petitioners' due process rights by failing to give them constitutionally adequate notice of their right to seek relief from defendant below, the United States Information Agency ("USIA"). *See Orthopedic Bone Screw Products*, 246 F.3d at 316. Petitioners were blameless for not timely filing proofs of claim where they never received notice of their right to do so, even assuming, *arguendo*, the notice satisfied the requirements of Rule 23 and the due process clause.[2]

Petitioner Dillon could not have appealed the adverse decision against her in 1998 because the district court did not enter a final decision at that time. Indeed, the district court and the court of appeals never found otherwise.

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[2] Petitioner Gottschalk acted promptly in seeking relief from the district court and did so as soon as she found counsel to represent her. Petitioner Chokhani also acted promptly in seeking relief from the district court.

Class counsel's statement that petitioner Chokhani was "aware of the litigation in 1991" is highly misleading. Ms. Chokhani received notice in 1991 of her entitlement to seek hiring relief as a member of the Foreign Service class and filed the requisite proof of claim. Ms. Chokhani's diligence in seeking relief in 1991 suggests she would have filed a proof of claim for monetary relief if defendant had properly notified her of her right to do so.

## III.

Class counsel also seeks to fill in the gaps of the legal analysis of the court of appeals by arguing that the allowing petitioners to participate in the settlement would be "prejudicial." Opposition of Class Counsel at 9-12. The arguments presented by class counsel on the prejudice issue contain two separate legal flaws. First, there is no real prejudice to the members of the class receiving relief because these class members are not, as a matter of law, "more deserving of remedy" than petitioners, where their failure to timely file these claims was not their fault. *Orthopedic Bone Screw Products*, 246 F.3d at 324. Thus, there can be no legal prejudice to other members of the class because petitioners are not less deserving of sharing in the settlement than those who filed claims in 1989. Further, petitioners are certainly not less deserving than those twenty-five class members who filed after the1989 deadline, but whose untimely claims were allowed when the consent decree was approved or those class members, including lead plaintiff Hartman, who received relief even after the court determined she was unqualified for the position for which she applied.[3]

Class counsel disputes the characterization of payments to class members as a "windfall," but this is simply a disagreement with the analysis of the Third Circuit. The federal agencies undoubtedly calculated their total liability at $508 Million, irrespective of the number of class members receiving payment.[4]

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[3] The district court failed to perform the *Pioneer* "excusable neglect" analysis for the late filers who missed the filing deadline, but were nevertheless allowed to participate in the settlement. Class counsel's argument that the late-filers "participated fully in the remedial proceedings" is misleading, because their claims were untimely as a matter of law under Judge Richey's rulings and were untimely until Judge Roberts reversed Judge Richey's 1989 ruling *nunc pro tanc* with his approval of the settlement in June, 2000.

[4] Accordingly, the federal defendant had no reason to object to allowing class members who filed untimely claims or who had lost their individual relief hearings to participate in the settlement.

Second, even assuming, *arguendo*, that the recovery by petitioners prejudices other class members, the "relatively small number of untimely claimants would have only a marginal" impact on the remaining claims. *Orthopedic Bone Screw Products*, 246 F.3d at 324, *citing Zients v. La Morte*, 459 F.2d 628, 630 (2d Cir. 1972). Since the district court has the fiduciary duty and the inherent authority to modify the consent decree to protect the interests of class members, *Zients*, *supra*, 459 F.2d at 630, the contention of class counsel that the district court would have been compelled to disapprove the consent decree is incorrect.

Contrary to the assertions of class counsel, the consent decree is not just another contract and is subject to approval and modification by the district court. *The Manual for Complex Litig.* §30.47 at 248 (3d ed. 1995) (courts should allow for adequate time for late claims prior to the distribution of the settlement fund); 2 H. Newberg & A. Conte, *Newberg on Class Actions*, §11.37, at 11-76 to 11-80 (3d ed. 1992). In fact, the district court has a special responsibility to see to the administration of justice and to protect members of the class and to modify the consent decree to protect the interests of absent class members. *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 194-195 (3rd Cir. 2001).

The fact that counsel for the parties agreed upon a settlement sum does not deprive the lower courts of their fiduciary responsibility to "see to the administration of justice," to protect absent members of the class or to authorize the lower courts to ignore two of the *Pioneer* factors, just because counsel for the parties decided that two of the petitioners should not be allowed to participate in the settlement just because they did not seek relief from court prior to the settlement discussions.[5] *Id.*

Since the district court had both the power and the

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[5] Dr. Dillon sought relief from the district court prior to the announcement of the settlement.

duty to allow petitioners to participate in the settlement without upsetting the consent decree, it follows that the parties would not be forced to renegotiate the agreement. Under the circumstances present here, there is no reason to believe that other class members have viable claims to participate in the settlement, or the right to file proofs of claim or to opt out of the class, particularly where these class members took no action in the district court to protect their rights and where the time for filing motions for relief under Fed.R.Civ.P. 60 has passed.

## IV.

Class counsel suggest that the length of the delay between the mailing of the notice and the time petitioners sought relief from the district court is dispositive of the "excusable neglect" issue. Since most of this time period was spent litigating class-wide liability and class certification, and a relatively smaller period of time was spent in relief proceedings, this passage of time is less important, particularly where petitioners sought relief from the district court ***prior*** to the entry of final judgment. In the Third Circuit cases on which petitioners rely, the court applied the *Pioneer* factors to the issue of "excusable neglect," even where the class members sought relief pursuant to motions filed under Fed.R.Civ.P. 60 more than ten days after the entry of final judgment.

The Third Circuit correctly analyzed the judicial administration issue and concluded that the equities were on the side of the late filers because the fund had not been distributed and the administration of the fund would be "insignificantly hampered by allowing these few late claims."*Orthopedic Bone Screw Products*, 246 F.3d at 326, citing *Zients*, 459 F.2d at 630-31.[6] Since petitioners sought

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[6] All of the cases cited by class counsel on p. 9 of the Opposition address substantial changes in the terms of the settlement and none discuss the issue of whether the district court can make *de minimis*

relief from the district court within the deadlines prescribed by the court and ***prior*** to the "fairness hearing," this factor militates even more strongly in favor of petitioners than it did for the class members in *Cendant Prides III, supra*, 235 F.3d at 180, who did not seek relief until after the entry of judgment.

## V.

Class counsel claim, based on a declaration from counsel for the defendant agency, that defendants allegedly made efforts to locate class members using social security numbers. The reality is that each petitioner provided USIA with her social security number when she applied for employment because this information is required on the federal application form. Since none of the petitioners received notice through the Social Security Administration, it follows that defendants failed and refused to provide any effective notice to petitioners by using social security numbers.[7]

The reliance of class counsel on published notice is irrelevant to the circumstances present here because each petitioner was readily identifiable as a member of the class, based on her application for employment with USIA. Where USIA knew that class members such as petitioners Dillon and Gottschalk did not receive the notice [because the mailing was returned to the agency], USIA was required to take further steps to notify them.[8] Similarly, where USIA had the

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changes in the settlement. *Evans v. Jeff D.*, 475 U.S. 717, 726-727 (1986); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989); *Officers for Justice v. Civil Serv. Comm'n of the City of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

[7] The actual wording of Ms. Nierenberg's June 12, 2000 Declaration, which was not made on personal knowledge, offers scant support for the arguments of class counsel: "This record indicates that Ms. Gottschalk's social security number ***may*** have been among the 2,038 records forwarded to the IRS in April, 1989." Nierenberg Declaration at ¶17. (Emphasis added).

[8] In view of USIA's actions in notifying Dr. Dillon, the belated

social security numbers of petitioners, USIA was required to use these numbers to give notice to these class members.[9] In view of the value of each of petitioners' claims and the millions of dollars spent giving notice by publication, due process required that USIA give actual notice to each class member.[10]

Class counsel failed to address petitioners' argument that where, as here, a notice is sent by mail to an invalid address and when the government knows or learns that this address was incorrect, such notice does not satisfy constitutional due process requirements. *Robinson v. Hanrahan*, 450 U.S. 38, 40 (1972) (notice of state forfeiture proceedings was inadequate when mailed to claimant's home while claimant was imprisoned). Here, USIA knew that at least two petitioners did not receive notice because the ***unsigned*** certified mail cards sent to them are part of the record below.

The notice requirements under Rule 23 have been modified since this Court decided *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Actual notice is required where feasible and the lower courts' termination of petitioners' rights without actual notice

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contention of class counsel that Dr. Dillon's "class membership could have been subject to challenge at a *Teamsters* hearing" lacks merit. Opposition at 23. We note this challenge was not raised by class counsel in the district court.

[9] Class counsel notes that USIA "remailed notice through the IRS" to reach Ms. Gottschalk. Opposition at 21. It follows that USIA did so only because the agency knew that Ms. Gottschalk did not receive the earlier mailing and that USIA believed Ms. Gottschalk was a member of the class. Class counsel's belated challenge to Ms. Gottschalk's membership in the class is surprising because USIA attached to its Opposition filed in district court Ms. Gottschalk's job application that was file stamped as received by USIA at 4:32 P.M. on August 20, 1984.

[10] The Third Circuit held that the class member Sambolin was not "culpable for this failure to note a small advertisement" run once on a newspaper he did not receive. *Orthopedic Bone Screw Products, supra*, 246 F.3d at 327 (footnote omitted).

violates due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 491 (1988); and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999).

## CONCLUSION

Under *Pioneer*, the court of appeals below was required to take "account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395 (footnote omitted). The court of appeals failed to do so. Since there was no consideration of two of the four *Pioneer* factors, the court of appeals necessarily could not properly "perform a balancing of the equitable factors of excusable neglect" required by the Third Circuit's decision in *Orthopedic Bone Screw Products*. For these reasons, the Petition for *Certiorari* should be granted.

Respectfully submitted,

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